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In the Supreme Court of the United States

OCTOBER TERM, 1982

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY and
NATIONAL TREASURY EMPLOYEES UNION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 7131(a), requires that a federal agency pay a per diem allowance and travel expenses to employee union representatives engaged in collective bargaining with the agency.

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v.

FEDERAL LABOR RELATIONS AUTHORITY and
NATIONAL TREASURY EMPLOYEES UNION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Bureau of Alcohol, Tobacco and Firearms, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-11a) is reported at 672 F.2d 732. The ruling of the Federal Labor Relations Authority (App. D, *infra*, 15a-34a) is reported at 4 F.L.R.A. No. 40.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1982 (App. B, *infra*, 12a-13a), and a timely petition for rehearing was denied on July 13,

1982 (App. C, *infra*, 14a). On October 1, 1982, Justice Rehnquist extended the time in which to file a petition for certiorari to and including November 10, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

5 U.S.C. (Supp. V) 7131 provides:

> (a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.
>
> (b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.
>
> (c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.
>
> (d) Except as provided in the preceding subsections of this section—
>
> > (1) any employee representing an exclusive representative, or
> >
> > (2) in connection with any other matter covered by this chapter, any employee in an

appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

5 U.S.C. (Supp. V) 5702(a) provides:

Under regulations prescribed under section 5707 of this title, an employee while traveling on official business away from his designated post of duty, or in the case of an individual described under section 5703 of this title, his home or regular place of business, is entitled to (1) a per diem allowance for travel inside the continental United States at a rate not to exceed $50, and (2) a per diem allowance for travel outside the continental United States, that may not exceed the rate established by the President, or his designee, for each locality where travel is to be performed. For travel consuming less than a full day, such rate may be allocated proportionately.

5 U.S.C. 5707(a) provides:

The Administrator of General Services shall prescribe regulations necessary for the administration of this subchapter, except that the Director of the Administrative Office of the United States Courts shall prescribe such regulations with respect to official travel by employees of the judicial branch of the Government.

STATEMENT

1. In October 1978 Congress enacted the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 ("the Act"). Title VII of the Act (5 U.S.C. (Supp. V) 7101 *et seq.*) governs labor-management relations, including collective bargaining, for nearly

all federal agencies.[1] Title VII replaced the federal labor relations program created in 1962 by Executive Order No. 10988, 27 Fed. Reg. 551.[2]

The Act establishes the Federal Labor Relations Authority ("FLRA" or "Authority") as a three-member independent body within the Executive Branch with responsibility for supervising the federal collective bargaining process under Title VII.[3] FLRA activi-

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[1] Certain federal employees, including members of the uniformed services and the Foreign Service, and certain agencies, including the General Accounting Office, Federal Bureau of Investigation, Central Intelligence Agency, and National Security Agency, are excluded from the coverage of Title VII. See 5 U.S.C. (Supp. V) 7103(a)(2) and (3). United States Postal Service employees also are excluded from Title VII coverage, since labor relations matters involving those employees are within the jurisdiction of the National Labor Relations Board. See 39 U.S.C. 1209.

Title VII protects the right of federal employees "to form, join, or assist any labor organization, or to refrain from any such activity" (5 U.S.C. (Supp. V) 7102), and it establishes a duty to bargain collectively in good faith. See 5 U.S.C. (Supp. V) 7116(a)(5) and (b)(5). The statute also outlines the matters subject to the bargaining obligation. See 5 U.S.C. (Supp. V) 7103(12), (14) and 7117. Certain management rights are excluded from the scope of bargaining. 5 U.S.C. (Supp. V) 7106. However, an agency must negotiate with a recognized union over procedures the agency will follow in exercising its reserved management rights. 5 U.S.C. (Supp. V) 7106(b)(2). The provisions of Title VII are to be read "in a manner consistent with the requirement of an effective and efficient Government." 5 U.S.C. (Supp. V) 7101(b).

[2] The executive order program was revised and continued by Executive Order No. 11491, 34 Fed. Reg. 17605 (1969), as amended by Executive Orders Nos. 11616, 11636, and 11838, 36 Fed. Reg. 17319, 24901 (1971) and 40 Fed. Reg. 5743 (1975).

[3] The FLRA replaced the Federal Labor Relations Council, which had similar responsibilities under the executive order program.

ties include adjudication of negotiability disputes, unfair labor practice complaints, bargaining unit issues, and arbitration exceptions, conduct of elections, and rulemaking. See 5 U.S.C. (Supp. V) 7105(a)(2)(A)-(I). The FLRA has the authority to issue orders against unfair labor practices (5 U.S.C. (Supp. V) 7118) and to seek enforcement of those orders in appropriate United States courts of appeals. 5 U.S.C. (Supp. V) 7123(b). Persons, including federal agencies, who are aggrieved by any final FLRA order may seek judicial review in the courts of appeals. 5 U.S.C. (Supp. V) 7123(a).

2. In November 1978 petitioner, the Bureau of Alcohol, Tobacco and Firearms of the Department of the Treasury, notified the National Treasury Employees Union ("the Union") that it intended to move its Lodi, California, office to Sacramento, and to establish a reduced duty post at a new location in Lodi (App. A, *infra*, 2a). The Union, which represented some of the Bureau's employees affected by the relocation, informed the Bureau that it wished to negotiate concerning the move and its impact on employees in the bargaining unit (App. D, *infra*, 22a). The Union designated as its bargaining agent for these negotiations Donald Pruett, a Bureau employee who lived in Madera, California, and was stationed in Fresno (App. A, *infra*, 2a). Pruett notified the Bureau that he wished to inspect the new Bureau facilities (Keehan deposition of March 7, 1980, at 11).[4] Bureau officials agreed to meet at the proposed Sacramento office and to examine the facilities there and in Lodi (App. A, *infra*, 2a).

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[4] The deposition of Mardell Keehan, a Bureau personnel specialist, is part of the record in this case (Tr. 8-11, 68-69). "Tr." refers to the transcript of the February 27, 1980, hearing before the FLRA Administrative Law Judge.

On the morning of February 23, 1979, several Bureau officials met Pruett in Sacramento and toured the offices. They inspected the physical facilities and the location of the desks, as well as the availability of restrooms, a cafeteria, and parking (Tr. 28-29, 54-56). Pruett "wandered around" by himself for a time, examining the building and offices (*id.* at 28-29). The parties then drove to Lodi and, after lunch, toured the new reduced office site, examining the proposed arrangement of desks, parking, and access to restaurants (*id.* at 57-66). Pruett and the Bureau officials then went to the existing Lodi office where they discussed the impact of the planned move (App. A, *infra*, 2a). Pruett pronounced the new facilities acceptable, except for parking availability in Sacramento (App. D, *infra*, 24a-25a). The parties discussed assignment of employees to the two new offices and the possibility of excusing employee tardiness for the first week in Sacramento (*id.* at 25a). On the day of negotiations Pruett left his home in Madera around 6:15 a.m. and returned at approximately 5:45 p.m., traveling a total of some 300 miles in his own car (*ibid.*; Tr. 36, 37).

Pruett sought to have the February 23 session classified as a quarterly meeting for which "official time" was authorized in the collective bargaining agreement between the Union and the Bureau (App. A, *infra*, 3a). A grant of "official time" allowed employee union representatives to be paid as if they were at work, without being charged for annual leave. The Bureau refused Pruett's request on the ground that the agreement did not authorize official time for mid-term negotiations, as opposed to the quarterly meetings (*ibid.*; App. D, *infra*, 23a).[5] The Bureau informed Pruett

[5] The agreement also made no reference to payment of a per diem allowance or travel expenses of employee union representatives engaged in collective bargaining (C.A. App. 136).

that he could take either annual leave or leave without pay for the day he had been away from his post (App. A, *infra*, 3a).

3. In June 1979, several months after the Bureau's decision not to authorize official time for Pruett, the Union filed an unfair labor practice charge with the FLRA. The Authority's General Counsel issued a complaint charging that Pruett was entitled to official time for his day of touring and negotiating under 5 U.S.C. (Supp. V) 7131(a), which governs authorization of official time for employee union representatives engaged in negotiation of a collective bargaining agreement (App. D, *infra*, 27a). In the course of a hearing before an Administrative Law Judge, the complaint was amended to add a claim that, in addition to paying his salary, the Bureau should have paid Pruett's travel expenses and a per diem allowance (App. A, *infra*, 3a).

In December 1979, shortly before the General Counsel filed this complaint against the Bureau, the FLRA had issued an Interpretation and Guidance concerning official time and travel expenses and per diem (2 F.L.R.A. No. 31; App. E, *infra*, 35a-47a).[6] In its Interpretation, the Authority first concluded that under Section 7131(a) federal agencies must grant official time to employee union representatives for all types of collective bargaining, including mid-term negotiations (App. E, *infra*, 37a-41a). The Authority then found that, although Section 7131(a) nowhere men-

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[6] Although the Authority provided a notice and comment period, the Interpretation apparently was issued not under the Authority's statutory power to promulgate regulations (5 U.S.C. (Supp. V) 7134), but rather under 5 U.S.C. (Supp. V) 7105(a)(1), which requires the Authority to provide leadership in establishing policies and guidance relating to federal labor-management relations (App. A, *infra*, 4a).

tions travel expenses or per diem allowances, that section nonetheless requires federal agencies to pay such costs for all employee union representatives for whom official time is granted for collective bargaining activities (App. E, *infra*, 41a-45a).

Following the hearing, the Administrative Law Judge found that negotiations had indeed taken place between Pruett and Bureau officials on February 23, 1979 (App. D, *infra*, 30a-31a). The ALJ stated that he considered himself constrained to follow the Authority's recent Interpretation and Guidance (*id.* at 28a-29a). He accordingly recommended that the Bureau be ordered to grant Pruett official time for the day of negotiations and to pay his travel costs and per diem and that it be required to post a notice stating that the Bureau would do the same for employee union representatives in future negotiations (*id.* at 32a-33a). The Bureau timely filed exceptions to the ALJ's decision with the Authority. In September 1980 the Authority affirmed and adopted the decision of the ALJ and ordered the recommended relief (*id.* at 15a-19a). The Bureau then sought review in the court of appeals pursuant to 5 U.S.C. (Supp. V) 7123(a), and the Union intervened as a party in that appeal.

4. On appeal, the Bureau raised two issues: (1) whether Section 7131(a) requires agencies to grant official time to employee union representatives for mid-term negotiations; and (2) assuming that official time is required, whether Section 7131(a) also requires payment of travel expenses and per diem of employee union representatives. The court of appeals enforced the Authority's order on both issues (App. A, *infra*, 1a-11a).

The court first held that it must give deference to the Authority's Interpretation and Guidance if it was

reasoned and supportable (App. A, *infra*, 4a-5a). The court concluded that the Authority's decision regarding official time for mid-term bargaining was reasonable, citing the language of the statute and its history (*id.* at 5a-9a).[7] The court gave relatively little attention to the issue of travel costs and per diem. It recognized, as did the Authority, that neither the statute nor its history refers to such payments (*id.* at 9a). The court reviewed the three reasons offered by the Authority in its Interpretation and Guidance as support for the view that the statute nonetheless requires payment of travel expenses and per diem[8] and concluded that the Authority's interpretation appeared reasonable (*id.* at 9a-10a).

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question concerning administration of the federal labor

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[7] This aspect of the court's decision is not challenged in our petition.

[8] The court summarized (App. A, *infra*, 9a-10a) the three reasons set out in the Authority's Interpretation and Guidance. The Authority had cited the fact that the language of Section 7131(a) is similar to that of 5 U.S.C. (Supp. V) 7131(c), which the Authority previously had interpreted as requiring payment of union travel expenses and per diem. (Like Section 7131(a), Section 7131(c), which governs availability of official time for participation in proceedings before the Authority, does not mention travel expenses or per diem.) In addition, the Authority had concluded that employee union negotiators who were on official time while they were engaged in collective bargaining must be considered to be conducting "official business," so that they would be entitled to travel expenses and per diem under a separate statute, 5 U.S.C. (& Supp. V) 5702. Finally, the Authority had stated that payment of travel expenses and per diem would be consistent with a congressional intent to equalize the positions of management and labor.

relations program established under Title VII of the Civil Service Reform Act of 1978. The court of appeals' decision enforces an FLRA order requiring a federal agency to pay travel expenses and a per diem allowance to an employee union representative engaged in collective bargaining with that agency. This holding imposes on federal taxpayers, rather than union members, a significant monetary liability representing the ordinary and necessary expenses of operating a union, without the slightest indication in the statute or its history that Congress intended to create such liability. This result is incorrect and is in direct conflict with decisions of two other circuits. Review by this Court is plainly warranted.

1. The decision of the court of appeals conflicts with recent decisions of the Second and Eighth Circuits. See *Division of Military & Naval Affairs* v. *FLRA*, 683 F.2d 45 (1982), rehearing denied (2d Cir. Sept. 17, 1982); *Department of Agriculture* v. *FLRA*, No. 81-1948 (Aug. 9, 1982), rehearing denied (8th Cir. Sept. 14, 1982).[9] The Second and Eighth Circuits concluded that Title VII does not require a

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[9] We have supplied copies of the Eighth Circuit's slip opinion to the Clerk of the Court and to counsel for respondents. Other cases involving challenges by federal agencies to FLRA orders requiring the payment of travel expenses and per diem allowances are pending in the Eleventh and District of Columbia Circuits. See, e.g., *Florida National Guard* v. *FLRA*, No. 81-5466 (11th Cir. argued Sept. 1, 1982); *Bureau of the Mint and United States Customs Service* v. *FLRA*, Nos. 82-1194, 82-1195 (D.C. Cir.).

Given the wide geographical dispersion of federal offices, this issue could arise in every circuit. The Act provides for judicial review of FLRA orders "in the United States courts of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the

federal agency to pay the travel expenses and per diem allowances of employee union representatives engaged in collective bargaining with the agency. Both courts expressly noted and rejected the contrary conclusion of the Ninth Circuit in this case. See *Division of Military & Naval Affairs* v. *FLRA*, *supra*, 683 F.2d at 47 n.3; *Department of Agriculture* v. *FLRA*, *supra*, slip op. 16 n.19.

This conflict in the circuits creates severe practical problems for federal agencies, because it results in different rules governing employees within the same agency or even the same bargaining unit, depending upon the location of their duty stations. Pursuant to the decision below, Bureau employees serving as bargaining agents in Sacramento will receive travel payments and per diem allowances; under the decisions of the Second and Eighth Circuits, on the other hand, Bureau employees in New York or St. Louis will not receive such payments. This disparate treatment will be most noticeable during national negotiations. For example, if Bureau employees travel from Sacramento and New York to Washington, D.C. to attend the same nationwide bargaining session, the agency must determine which employee negotiators (if any) must receive travel expenses. A similar problem will arise if an employee stationed in a circuit with one rule travels to a bargaining session in a circuit with a different rule. This lack of uniformity creates substantial uncertainty about what rule applies in a particular case and places federal agencies in the awkward posture of affording different treatment to similarly

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District of Columbia." 5 U.S.C. (Supp. V) 7123(a). The term "person" includes a federal agency. 5 U.S.C. (Supp. V) 7103(a)(1).

situated employees. It may also result in artificial decisions about where negotiations will be held and which representatives will be chosen to attend.

The FLRA policy upheld by the court of appeals will spawn other adverse consequences. It will create unnecessary friction between unions and agencies by obliging agencies to monitor the travel of employee union representatives to ensure that such travel is reasonable.[10] Monitoring is likely to result in dissension if the agency concludes that union travel expenses are unreasonable.[11] Moreover, as agencies are increasingly subjected to budgetary constraints, they may be forced to choose between cutting travel expenses (including union travel) and reducing other agency activities, creating the potential for claims of discrimination against union activity.

The FLRA policy also seems likely to lead to inefficiencies in the collective bargaining process. The Authority's decision forces an agency to bear virtually

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[10] An agency may be required to monitor its employees' travel expenses in connection with investigations of such expenses by the Administrator of General Services. See 5 U.S.C. 5707(b).

[11] Indeed, an instance of such a problem already has surfaced before the FLRA. See *Department of the Air Force, Air Force Logistics Command, Wright-Patterson & AFGE, Council 214*, 10 F.L.R.A. No. 53 (Sept. 30, 1982). In that case a union filed an unfair labor practice charge with the Authority after the agency refused to pay travel expenses and per diem allowances for certain employee union negotiators who were to be brought from a distant location. The union had refused to explain why employee representatives stationed at the bargaining site could not be used for the negotiations, and as a result the agency was unable to certify that the travel demanded by the union was essential, as required by departmental travel regulations. The Authority found that the agency had committed an unfair labor practice.

the entire expense of collective bargaining: the agency must pay the salaries of both its own negotiators and those of the employee union representatives, as well as the travel expenses and per diem allowances of both groups. This places considerable pressure on the agency to compromise, while concurrently removing pressure from the union to do so. Thus, federal agencies will be at a distinct disadvantage if they are faced with protracted negotiations. Unlike the situation in the private sector, in which each party bears the costs incurred by its own representatives (see page 15, *infra*), the parties here will occupy unequal positions, thus undermining effective collective bargaining. This result seems clearly inconsistent with the congressional mandate that the statute should be interpreted "in a manner consistent with the requirement of an effective and efficient Government." 5 U.S.C. (Supp. V) 7101(b).

Finally, the FLRA policy will prove costly to federal taxpayers. The Office of Personnel Management has estimated that application of the FLRA Interpretation would cost 15 agencies over $2 million per year. See Gov't Empl. Rel. Rep. (BNA) No. 852, at 11 (Mar. 10, 1980).[12]

2. These consequences need not be suffered, because the decision of the court of appeals is incorrect.

a. The FLRA acknowledged in its Interpretation and Guidance that Title VII does not mention payments for travel expenses and per diem of employee union representatives (App. E, *infra*, 42a). Section 7131(a), on which the Authority relied, refers only

[12] Several months prior to the filing of this petition, the Office of Personnel Management surveyed selected government agencies and determined that travel expenses and per diem of employee union representatives of those agencies had totaled several million dollars over a 12-month period.

to authorization of official time for employee union representatives during the period they would otherwise be in a duty status.[13] Neither that section nor any other section of Title VII refers to payment of travel expenses or per diem. In addition, there is no discussion of travel expenses or per diem in the legislative history of the Act.

It is quite unlikely that Congress would have imposed a significant monetary obligation on the government by requiring that federal agencies pay travel expenses and per diem of employee union representatives without expressly referring to such a requirement. Under the executive order program that had previously governed federal labor relations, the established administrative practice was for each party to bear the expenses of its own representatives (App. E, *infra*, 42a n.6). In fact, payment by federal agencies of the expenses of employee union representatives engaged in collective bargaining appears to have been prohibited in most instances. See 46 Comp. Gen. 21 (1966). Congress must be presumed to have been aware of this practice (*Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978)), but gave no indication that it intended to change it. The failure affirmatively to alter the settled administrative practice suggests that Congress intended to codify it. See *Haig* v. *Agee*, 453

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[13] Section 7131(a) reads:

> Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

U.S. 280, 300 (1981); *Lorillard* v. *Pons, supra*, 434 U.S. at 580; *Shapiro* v. *United States*, 335 U.S. 1, 16 (1948).

Moreover, payment by the employer of union travel expenses and per diem is not the norm in the private sector. The National Labor Relations Board has compelled employers to pay union travel expenses and per diem only as an extraordinary remedy for an employer's failure to bargain in good faith. See *Division of Military & Naval Affairs* v. *FLRA, supra*, 683 F.2d at 48. In view of the previous administrative practice in the federal sector and the prevailing patterns in the private sector, it is reasonable to expect that Congress would have affirmatively expressed any intent to impose a new and different rule. See *Weinberger* v. *Rossi*, No. 80-1924 (Mar. 31, 1982), slip op. 8; *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 278-279, 285 n.13 (1974). As the FLRA has acknowledged, there is no such expression here.

If anything, the language and history of the statute argue against the FLRA interpretation. Section 7131 (a) refers to official time for employees in terms of the period they "otherwise would be in a duty status." But per diem allowances are primarily for costs generally incurred outside duty hours—breakfast, dinner, and overnight lodging. Travel expenses also are frequently incurred outside duty hours. The reference to duty status thus suggests that Congress did not intend to use Section 7131(a) as a vehicle for imposing liability on the government for travel expenses and per diem of employee union representatives.

In addition, when Congress enacted Title VII it expressly changed the treatment of official time. Previously, Section 20 of Executive Order No. 11491, 34 Fed. Reg. 17614 (1969), had permitted parties to agree on grants of official time to employee union

negotiators, up to a total of 40 hours or one-half of the bargaining time during regular working hours. In contrast, Section 7131(a) now mandates unlimited official time for negotiations during the time an employee otherwise would be in a duty status. This specific change from the executive order program was discussed by Congress during consideration of Title VII.[14] The treatment of official time stands in sharp contrast to the absence of any mention of an intent to alter the established practice under which agencies were not required to pay union travel expenses or per diem. The inappropriateness of implying any intent to change the treatment of travel expenses and per diem is confirmed by the statement of Representative Udall, the primary sponsor of Title VII, during the debate on the legislation: "What we really do is to codify the 1962 action of President Kennedy in setting up a basic framework of collective bargaining for Federal employees. * * * The Federal employee unions do not get much out of this amendment process that is not already in the Executive order." 124 Cong. Rec. 29182 (1978).

b. Given the lack of any evidence that Congress intended to create agency liability for travel expenses and per diem of employee union representatives, the court of appeals' ruling is plainly contrary to the rule of statutory construction applied by this Court in *United States* v. *Zazove*, 334 U.S. 602 (1948). In *Zazove* the Court refused to adopt a statutory interpretation that would have increased the government's monetary liability without a clear showing that Congress so intended (*id.* at 616-617). The Court noted that "Congress nowhere specified that the United States would bear the huge cost of the enhanced lia-

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[14] See, e.g., 124 Cong. Rec. 29188 (1978).

bility" caused by the interpretation urged by the respondent in that case. "[A]nd that striking omission is persuasive, in the absence of cogent considerations to the contrary, that no generosity of this magnitude was contemplated" (*ibid.*; footnote omitted). Accord, *Pine Hill Coal Co.* v. *United States*, 259 U.S. 191, 196 (1922).

Indeed, the court of appeals' ruling is contrary to the more general principle that waivers of sovereign immunity must be strictly construed. See *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941). A waiver of sovereign immunity may not be implied, but must be unequivocally expressed. See, e.g., *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *Testan*, 424 U.S. 392, 399 (1976). This principle is fully applicable to the case of monetary claims by federal employees against a federal agency. See *United States* v. *Testan*, *supra* (employee claims for back pay). Because payments for travel expenses and per diem are nowhere mentioned in Title VII or its legislative history, there is no unequivocally expressed waiver of sovereign immunity that would permit a court to enforce an order requiring such payments.[15]

c. Although the language and history of Title VII and principles of statutory construction indicate that the FLRA Interpretation and Guidance is incorrect,

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[15] We do not argue that the Authority may not order appropriate monetary relief once it has properly found an unfair labor practice. See 5 U.S.C. (Supp. V) 5596(b). However, there must first be an unfair labor practice to be remedied. The Authority may not, as it has done here, identify an unfair labor practice by stretching the statute to find an implied intent to pay.

the court of appeals concluded that it should defer to that Interpretation and that the Interpretation was reasoned and supportable. The court's conclusion is erroneous for several reasons.

First, the court's deference was inappropriate in this case. The Interpretation and Guidance is an interpretive rule and thus is entitled to less weight than a rule issued pursuant to the FLRA's rulemaking authority (App. A, *infra*, 4a). Moreover, as this Court noted in *NLRB* v. *Brown*, 380 U.S. 278, 291-292 (1965), quoting *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965), " 'the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' " Whether to require federal agencies to pay out substantial sums of money to fund federal employee union travel and per diem is plainly a "major policy decision[] properly made by Congress," and the court therefore should have examined critically the FLRA's reasoning. In addition, and perhaps most important, the FLRA's Interpretation was based in large part on its construction of the term "official business," as used in 5 U.S.C. (& Supp. V) 5702, a statute that is administered not by the Authority but by the General Services Administration. See 5 U.S.C. 5707(a). No deference is due an agency's interpretation of a statute it does not administer. See, e.g., *Department of Agriculture* v. *FLRA*, *supra*, *slip* op. 9-10; *New Jersey Air National Guard* v. *FLRA*, 677 F.2d 276, 281-282 n.6 (3d Cir.), cert. denied, No. 82-224 (Nov. 8, 1982); *Whaley* v. *Schweiker*, 663 F.2d 871, 873 (9th Cir. 1981); *March* v. *United States*, 506 F.2d 1306, 1316 (D.C. Cir. 1974).

Second, the reasoning offered by the FLRA in support of its Interpretation does not withstand scrutiny. The court of appeals found it significant that the Authority had read Sections 7131(c) and 7131(a) consistently (App. A, *infra*, 9a). Section 7131(c) permits the Authority to require official time for employees participating in FLRA proceedings on behalf of their unions. Like Section 7131(a), Section 7131 (c) nowhere mentions travel expenses or per diem. No court has yet determined whether the Authority's reading of the latter section is proper. Thus, it is as unsupported as the Authority's view of Section 7131(a); the fact that the Authority has interpreted the two provisions consistently does not make either interpretation correct.

The court of appeals also accepted the Authority's assertion that, because Congress declared collective bargaining in the federal sector to be in the public interest (see 5 U.S.C. (Supp. V) 7101(a)), employees representing their unions in negotiations must be conducting "official business," and thus are entitled to receive travel expenses and per diem under 5 U.S.C. (& Supp. V) 5702 (App. A, *infra*, 10a). But nothing in 5 U.S.C. (& Supp. V) 5702 itself or in regulations issued by the Administrator of General Services indicates that collective bargaining comes within the term "official business." [16] That term normally refers to

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[16] **Under 5 U.S.C. 5707(a), the Administrator of General Services is authorized to make rules for the administration of 5 U.S.C. (& Supp. V) 5702. The Administrator has concluded that each individual agency should make its own determination of when its employees are engaged in "official business." FLRA's interpretation purporting to override the determinations of individual agencies in the area of collective bargaining thus is inconsistent with the Administrator's decision concerning how the statute should be administered.**

work done on behalf of an agency, pursuant to a directive from the agency. Unlike an agency representative, however, a union bargaining agent is not acting on behalf of the agency; instead, his goal is to gain benefits for the members of the bargaining unit (which includes himself) and for the union. This Court observed last Term that opposing parties in collective bargaining do not pursue the same goal: "The entire process of collective bargaining is structured and regulated on the assumption that '[t]he parties * * * still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest.'" *General Building Contractors Association, Inc.* v. *Pennsylvania*, No. 81-280 (June 29, 1982), slip op. 18, quoting *NLRB* v. *Insurance Agents*, 361 U.S. 477, 488 (1960).[17]

Finally, the court below accepted the Authority's explanation that federal agencies should pay union travel expenses and per diem because Congress intended to equalize the positions of unions and agencies (App. A, *infra*, 10a). The Authority's sole support for this conclusion was a statement by Representative Clay (App. E, *infra*, 43a-44a), which concerned grants of official time for union bargaining agents

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[17] **The Comptroller General has recognized the difference between federal employee union representatives who are on official time during negotiations and agency personnel who are on official business. In an opinion addressing the earlier executive order program, which permitted official time for bargaining on a limited basis, the Comptroller General stated that even though union/agency negotiations "may contribute to the effective conduct of public business," union representatives should not be considered as conducting the official business of the United States. 44 Comp. Gen. 617, 618 (1965). He concluded: "On the contrary it would seem that such negotiations by employee representatives are primarily in the interest of the employee organization" (*ibid.*).**

and did not mention travel costs or per diem (124 Cong. Rec. 29188 (1978)). Thus, it does not support the broad conclusion reached by the Authority.[18] In any event, assuming Congress intended to create greater equality between the positions of unions and agencies, there is no indication that it meant for the Authority to go beyond the steps Congress itself mandated to achieve that objective.[19]

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[18] Moreover, even the treatment of official time adopted by Congress refutes the Authority's view. Rather than requiring precisely equal treatment, Section 7131(a) specifically limits official time for employee union representatives to periods when the employees would otherwise be in a duty status; no such limit is imposed with respect to agency representatives.

[19] The FLRA actually spoke in terms of equalizing the situation of union and management negotiators, noting that the latter are uniformly paid travel expenses and per diem when they are engaged in collective bargaining (App. E, *infra*, 43a-44a). However, employee union representatives are not necessarily in a different position, given the fact that unions have financial resources that can be used for payment of such expenses. See 5 U.S.C. (Supp. V) 7115. The question is whether Congress intended that the federal government, rather than the unions themselves, should reimburse the expenses of employee union representatives engaged in collective bargaining on behalf of the unions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

CAROLYN F. CORWIN
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WILLIAM KANTER
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NOVEMBER 1982

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80-7673, 81-7021

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, Western Region, Department of Treasury, San Francisco, PETITIONER/CROSS-RESPONDENT

vs.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT/CROSS-PETITIONER

NATIONAL TREASURY EMPLOYEES UNION, INTERVENOR

FLRA No. 9-CA-93

[Filed Mar. 22, 1982]

Argued and Submitted February 11, 1982

On Petition for Review and Cross-Application for Enforcement of an Order of the Federal Labor Relations Authority

BEFORE: DUNIWAY and CANBY, Circuit Judges, and HALBERT,* District Judge

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* Honorable Sherrill Halbert, United States District Judge, Eastern District of California, sitting by designation.

OPINION

HALBERT, District Judge:

The Bureau of Alcohol, Tobacco, and Firearms (ATF) petitions for review of a Federal Labor Relations Authority (FLRA) finding of an unfair labor practice under Title VII of the Civil Service Reform Act, 5 U.S.C. § 7101 *et seq.* The FLRA cross-petitions for enforcement of its order requiring ATF to pay its employee, Pruett, official time, travel expenses, and per diem for time spent negotiating the effect of a proposed change in location of an ATF facility.

I. *Facts*

The facts are not in dispute. In November of 1978, ATF notified the National Treasury Employees Union (Union) that it intended to move its Lodi, California office to Sacramento and establish a reduced duty post at another location in Lodi. The Union wanted to negotiate the move and designated Donald Pruett, an ATF employee, as its representative. Pruett lived in Madera, California, and worked at the ATF office in Fresno.

It was agreed that Pruett and ATF officials would meet at the proposed Sacramento facility on February 23, 1979. They examined that facility, then drove to the new Lodi facility to view it. Eventually, they went to the existing Lodi offices to discuss the impact the moves would have on bargaining unit members and to negotiate matters such as parking facilities, assignment of certain employees, and excused tardiness for the first week in the Sacramento facility. The agreements reached were memorialized in a letter.

The existing collective bargaining agreement between ATF and the Union provided for quarterly meetings for which union representatives would be granted official time. Pruett sought to have the February 23 meeting classified as such, but ATF denied the request. Pruett was told that he could take either leave without pay or annual leave for the day.

As a result of ATF's actions, the Union filed an unfair labor practice charge in June of 1979 and the FLRA General Counsel issued a complaint in January 1980. That complaint charged that ATF's failure to count the February 23 meeting as official time was an unfair labor practice under 5 U.S.C. § 7116(a)(1), (a)(8). (The complaint was amended at the administrative hearing to include charges concerning travel and per diem expenses.)

The administrative law judge's determination that an unfair labor practice had been committed was based on an Interpretation and Guidance issued by the FLRA in December of 1979. That Interpretation stated that Title 5, United States Code, Section 7131(a) mandated the authorization of official time for all collective bargaining negotiations, and that if representatives were entitled to official time they were also entitled to travel and per diem reimbursements. *See* 44 Fed. Reg. 76581 (Dec. 27, 1979). The administrative law judge therefore ordered ATF to pay Pruett the appropriate sums and to post a notice indicating that ATF would grant official time and make travel and per diem payments to union representatives engaged in midterm bargaining negotiations. The FLRA affirmed that finding in September 1980.

II. *Analysis*

A. *Standard of Review*

Review of a decision of the FLRA shall be on the record in accordance with 5 U.S.C. § 706, *see* 5 U.S.C. § 7123(c), and the agency's action shall be set aside only if arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. *Id.* § 706(2)(A). In the case at bar, if the FLRA's Interpretation and Guidance is found to be a reasonable interpretation of the law, the FLRA decision is clearly not arbitrary and capricious. It is therefore necessary to focus our attention on the Interpretation and Guidance itself.

The FLRA has been granted the authority to promulgate rules and regulations under 5 U.S.C. § 7134. The Interpretation, however, does not appear to have been issued pursuant to that statute, although the FLRA did provide notice and an opportunity to comment. *See* 44 Fed. Reg. 42778 (July 20, 1979); *id.* at 76581 (Dec. 27, 1979). Rather, the Interpretation seems to have been issued pursuant to 5 U.S.C. § 7105(a)(1), which requires the FLRA to provide leadership in establishing policies and guidelines and to take responsibility for carrying out the purpose of Title VII. As an interpretative rule, therefore, it may be accorded less weight than rules issued pursuant to the delegated rulemaking authority of Congress. *See General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141 (1976). The Supreme Court has stated that although interpretative rules reflect an agency's special expertise and are thus entitled to deference, their weight on judicial review will also depend on the thoroughness evident in their consideration, the validity of the reasoning, and their consistency with ear-

lier and later pronouncements. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Since the Interpretation at issue merely expresses the agency's view on the meaning of existing law, based on examination of the legislative history and general purpose of Title VII, it does not have the force of law, but shall be given deference if reasoned and supportable. *See, e.g., Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 11 (1980); *Magma Copper Co.* v. *Secretary of Labor*, 645 F.2d 694, 696 (9th Cir. 1981), *cert. denied* 102 S. Ct. 475 (1981); *Montana Power Co.* v. *Environmental Protection Agency*, 608 F.2d 334, 345 (9th Cir. 1979). If an agency's construction of a statute is reasonably defensible, it should not be rejected simply because a court might prefer another view, *see Department of Defense* v. *FLRA*, 659 F.2d 1140, 1161 (D.C. Cir. 1981), *cert. denied sub nom. AFGE* v. *FLRA*, 50 L.W. 3669 (1982), although an agency should not be permitted to usurp Congressional authority to make major policy decisions. *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979). It is our determination that the Interpretation and Guidance under examination here is reasoned and supportable.

B. *The grant of official time for midterm collective bargaining negotiations*

Title 5, United States Code, Section 7131(a) provides:

> Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceedings, dur-

> ing the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

The question presented is whether that section authorizes "official time" for employee representatives during midterm negotiations, as opposed to the negotiation of a basic collective bargaining agreement. The FLRA found, based on an examination of the express language of the statute, legislative history, and public policy, that it does. We agree.

Turning first to the statutory language, we take note of the axiom that whenever the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout unless there is evidence of a contrary intent. *See, e.g., Northern Plains Resource Council* v. *EPA*, 645 F.2d 1349, 1355 (9th Cir. 1981); *Chugach Natives, Inc.* v. *Doyon, Ltd.*, 588 F.2d 723, 725 (9th Cir. 1978); *United States* v. *Gertz*, 249 F.2d 662, 665 (9th Cir. 1957). That rule is especially important in cases such as this, where the answer to our inquiry does not appear either on the face of the statute or in the legislative history.

Title VII defines "collective bargaining" as performance of the mutual obligation to meet at reasonable times and to bargain in a good faith effort to reach agreement with regard to conditions of employment,[1] 5 U.S.C. § 7103(a)(12), and a collective bar-

[1] "Conditions of employment" are defined as personnel policies affecting working conditions. *Id.* § 7103(a)(14). Therefore, the obligation to bargain in good faith clearly applies to these facts.

gaining agreement is defined as an agreement entered into as a result of collective bargaining. *Id.* § 7103(a)(8). Furthermore, Section 7114(b)(3) provides that in order to fulfill the obligation to negotiate in good faith, agency and union representatives shall meet "as frequently as may be necessary." It is therefore clear that the reference to "negotiation of a collective bargaining agreement" in Section 7131 (a) encompasses all situations in which agency and union representatives meet with the objective of conducting good faith negotiations concerning conditions of employment. The statute's application cannot be limited to the negotiation of basic agreements.

The legislative history of Title VII likewise supports the conclusion that official time is authorized for employee representatives conducting midterm bargaining. Title VII is for the most part a codification of Executive Order 11491,[2] *reprinted in* 5 U.S.C. foll. § 7103. Section 20 of Executive Order 11491 allowed management and employees to negotiate grants of official time subject to certain limitations, and was interpreted by the Federal Labor Relations Council[3] to limit such grants of official time to the negotiation of basic agreements or management-initiated changes in working conditions. *See Local 2151, A.F.G.E., AFL-CIO, et al.*, F.L.R.C. 76A-106, 5 F.L.R.C. 373, 374, 375 (May 18, 1977).

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[2] 5 U.S.C. § 7135(b) provides that the provisions of, *inter alia*, Executive Order 11491 shall remain in effect unless superseded by Title VII. Under the FLRA's reasoning, Section 7131(a) supersedes the Order's provision that grants of official time may be negotiated.

[3] The Federal Labor Relations Council was the predecessor of the FLRA.

When debating Title VII, however, Congress rejected language that would have preserved the limitation on authorization of official time to negotiations of basic agreements,[4] *see* S. Rep. No. 95-969, 95th Cong., 2d Sess. 112, *reprinted in* [1978] U.S. Code Cong. & Ad. News 2723, 2834, enacting instead the language of Section 7131(a). ATF argues that since that section is silent with regard to official time for midterm negotiations, Congress evidently intended to preserve the restrictions of Executive Order 11491. The rejection of language that would have yielded that result persuades us that the FLRA reasonably concluded that Congress intended to enact an authorization of official time for midterm as well as basic collective bargaining agreements.

Congress' specific finding that collective bargaining in the federal service is in the public interest further aids this conclusion. *See* 5 U.S.C. § 7101(a). The FLRA has taken this a step further by reasoning that equalization of the positions of labor and management enhances the effectiveness of collective bargaining. The granting of official time for employee negotiators merely reflects the situation of government negotiators, who are commonly afforded official time for collective bargaining negotiations.

In short, we are unpersuaded by ATF's argument that the silence of the statute and legislative history

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[4] Section 7232 of the Senate version of the bill limited grants of official time to negotiations "relating to the negotiation or renewal of a basic collective bargaining agreement, as opposed to negotiations which arise out of circumstances during the term of the basic agreement (midcontract negotiations)." Furthermore, that section limited the amount of official time that could be authorized in any event to 40 hours or one-half the time spent in negotiations, and required that such grants be negotiated by the parties.

requires us to assume that Congress intended to restrict the availability of official time for midterm negotiations. Congress had the clear opportunity to adopt language limiting official time to the negotiation of basic agreements. Its failure to do so, combined with the fact that a consistent reading of the statutory language indicates that "collective bargaining agreement" refers to both midterm and basic agreements, leads us to conclude that the FLRA's Interpretation and Guidance is reasoned and supportable on this point; hence, it will be given deference.

C. *Availability of travel expenses and per diem*

The FLRA's determination that union negotiators are entitled to travel expenses and a per diem is based largely on its finding that Section 7131(a) authorizes official time for midterm negotiations. Once again, neither the statutory language nor the legislative history expressly refers to this question. The FLRA identified three factors that nevertheless appear to indicate that these expenses are authorized.

Analogous language to Section 7131(a) exists to support the conclusion that these reimbursements are warranted. Section 7131(c) states that the FLRA shall determine whether labor representatives in proceedings before the FLRA "shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status." That language is nearly identical to language in Section 7131(a), and has been interpreted to mandate travel expenses and per diem any time the FLRA deems the presence of an employee necessary at FLRA proceedings. *See* 5 C.F.R. § 2429.13. It is therefore reasonable to conclude that both subsections should be given the same interpretation in this regard.

The FLRA mustered additional support for its position by observing that if union negotiators are on official time, they should be interpreted to be on official government business within the meaning of 5 U.S.C. § 5702(a). Employees on official government business are entitled to a per diem allowance for travel. *See* 5 U.S.C. § 5702(a). The FLRA buttressed its conclusion that labor representatives conducting collective bargaining negotiations are on official government business by citing 5 U.S.C. § 7101 (a)(1)(B), in which Congress stated that collective bargaining in the civil service contributes to the effective conduct of public business. Thus, it appears that labor representatives should be treated similarly to other government employees conducting business for the government.

Congress' finding that collective bargaining is in the public interest also indicates that the positions of management and labor should be equalized with regard to collective bargaining, according to the FLRA. It is beyond argument that if union representatives are granted travel expenses and a per diem, their position would more nearly equal that of management representatives, who were found uniformly to be paid travel expenses and per diem. The statements of Congress to the effect that collective bargaining is favored by public policy reasonably support the FLRA's effort to equalize the positions of the parties to collective bargaining negotiations.

In light of the above, we find no merit to ATF's contentions that the availability of travel expenses and per diem will impair the willingness of union negotiators to reach agreement. A remedy for that

eventuality is provided by Title VII's mandate of good faith negotiations and the availability of recourse to the Federal Service Impasses Panel. *See generally* 5 U.S.C. § 7119. We are unwilling to construe the FLRA's Interpretation and Guidance as a license for labor representatives to be dilatory and extravagant; actually, it appears that that Interpretation yields no more advantage to labor negotiators than that formerly possessed by management negotiators.

III. *Conclusion*

The FLRA's Interpretation and Guidance is reasoned and supportable, and therefore will be given deference by this Court. The FLRA, acting in its own area of expertise, has interpreted the relevant language of Title VII in a clearly defensible manner, and we are neither permitted nor inclined to substitute a different judgment.

ATF's petition for review is denied, and the Order of the Federal Labor Relations Authority is ordered enforced.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No[s]. 80-7673 [and] 81-7021

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
Western Region, Department of Treasury,
San Francisco, PETITIONER/CROSS-RESPONDENT

vs.

FEDERAL LABOR RELATIONS AUTHORITY,
RESPONDENT/CROSS-PETITIONER

NATIONAL TREASURY EMPLOYEES UNION,
INTERVENOR

FLRA #9-CA-93
Northern CA

JUDGMENT

Upon Petition to Review a Decision of The FEDERAL LABOR RELATIONS AUTHORITY

This Cause came on to be heard on the Transcript of the Record from The FEDERAL LABOR RELATIONS AUTHORITY and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the petition for review of an order by the FLRA in this cause be

and hereby is denied, and the Order of the FLRB [*sic*] is ordered enforced.

Filed and entered March 22, 1982

A TRUE COPY
ATTEST July 22, 1982
PHILLIP B. WINBERRY
Clerk of Court

by: /s/ Oscar Tagle
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 80-7673 [and] 81-7021

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
Western Region, Department of Treasury,
San Francisco, PETITIONER/CROSS-RESPONDENT

vs.

FEDERAL LABOR RELATIONS AUTHORITY,
RESPONDENT/CROSS-PETITIONER

and

NATIONAL TREASURY EMPLOYEES UNION,
INTERVENOR

[Filed July 13, 1982]

Before: DUNIWAY and CANBY, Circuit Judges, and HALBERT,* District Judge

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion of a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion of a rehearing in banc is rejected.

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* The Honorable Sherrill Halbert, Senior United States District Judge for the Eastern District of California, sitting by designation.

APPENDIX D

4 FLRA No. 40

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 9-CA-93

BUREAU OF ALCOHOL, TOBACCO and FIREARMS,
WESTERN REGION, DEPARTMENT OF THE TREASURY,
SAN FRANCISCO, CALIFORNIA, RESPONDENT

and

NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 81, CHARGING PARTY

DECISION AND ORDER

The Administrative Law Judge in the above-entitled proceeding issued his Recommended Decision and Order finding that Respondent had engaged in the unfair labor practice alleged in the complaint, and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions to the Administrative Law Judge's Recommended Decision and Order.

Pursuant to section 2423.29 of the Authority's rules and regulations (5 CFR 2423.29) and section 7118 of the Federal Service Labor-Management Relations Statute (5 U.S.C. §§ 7101-7135), the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are

hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in the subject case, including the Respondent's exceptions, the Authority hereby adopts the Administrative Law Judge's findings, conclusions, and recommendations, to the extent consistent herewith.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's rules and regulations and section 7118 of the Statute, the Authority hereby orders that the Bureau of Alcohol, Tobacco and Firearms, Western Region, Department of the Treasury, San Francisco, California, shall:

1. Cease and desist from:

(a) Failing and refusing to provide to Donald Pruett or any Agency employee, while engaged in representing the National Treasury Employees Union, Chapter 81, the employees' exclusive representative, during Union-Agency negotiations of a collective bargaining agreement, official time for such participation including necessary travel time as occurs during the employee's regular work hours and when the employee would otherwise be in a work or paid leave status. In addition, necessary transportation and per diem expenses shall be paid by the employing activity or agency.

(b) In any like or related matter, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Provide Union representative Donald Pruett official time for the performance of his representa-

tional duties on February 23, 1979, and make him whole for the annual leave he utilized on that date, and upon submission of an appropriate voucher, pay to Donald Pruett whatever travel and per diem expenses an employee engaged in official Agency business would be entitled.

(b) Post at its various offices in the Western Region wherein unit employees are located, copies of the attached notice marked "Appendix." Copies of said notice, to be furnished by the Regional Director for Region 9, after being signed by an authorized representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Issued, Washington, D.C., September 29, 1980

/s/ Ronald W. Haughton
RONALD W. HAUGHTON
Chairman

/s/ Henry B. Frazier III,
HENRY B. FRAZIER III
Member

/s/ Leon B. Applewhaite
LEON B. APPLEWHAITE
Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE

POLICIES OF CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT

RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES

THAT:

WE WILL NOT fail or refuse to provide to Donald Pruett or any Agency employees, while engaged in representing the National Treasury Employees Union, Chapter 81, the employees' exclusive representative, during Union-Agency negotiations of a collective bargaining agreement, official time for such participation including necessary travel time as occurs during the employee's regular work hours and when the employee would otherwise be in a work or paid leave status. In addition, necessary transportation and per diem expenses shall be paid by the employing activity or agency.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL provide Union representative Donald Pruett official time for the performance of his repre-

sentational duties on February 23, 1979, and make him whole for the annual leave he utilized on that date and, upon submission of an appropriate voucher, pay to Donald Pruett whatever travel and per diem expenses an employee engaged in official Agency business would be entitled.

_____

(Agency or Activity)

Dated: _____ By: _____

Signature

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Region 9, Federal Labor Relations Authority, whose address is: 450 Golden Gate Avenue, Room 11408, P.O. Box 36016, San Francisco, CA 94102, and whose telephone number is (415) 556-8105.

[SEAL]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

Case No. 9-CA-93

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
WESTERN REGION, DEPARTMENT OF THE TREASURY,
SAN FRANCISCO, CALIFORNIA, RESPONDENT

and

NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 81, CHARGING PARTY

Michael Sitcov, Esquire, For the Respondent

Stephanie Arthur, Esquire, For the General Counsel

David Handsher, Esquire, For the Charging Party

Before: SALVATORE J. ARRIGO, Administrative Law Judge

DECISION

Statement of the Case

This matter arose under the provisions of the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. § 7101 *et seq.*, (herein referred to as the Statute). Essentially, the case involves whether Respondent is obligated under the

Statute to grant official time, travel and per diem expenses to an employee-union representative relative to his participation in collective bargaining negotiations with the Respondent.

Upon an unfair labor practice charge filed on June 21, 1979, the General Counsel of the Federal Labor Relations Authority, by the Regional Director for Region 9, issued a Complaint and Notice of Hearing on January 29, 1980, alleging that the Bureau of Alcohol, Tobacco and Firearms, Western Region, an activity within the Department of the Treasury, engaged in unfair labor practices within the meaning of Sections 7116(a)(1) and (8) of the Statute by refusing to grant to Donald Pruett, a representative of the National Treasury Employees Union, Chapter 81, (the Union) official time in which to engage in negotiations over the impact and implementation of Respondent's proposals concerning an office relocation.[1] Respondent denied the commission of any unfair labor practice and a hearing before the undersigned was conducted on February 27, 1980.

At the hearing all parties were represented by counsel and afforded full opportunity to adduce evidence and call, examine and cross examine witnesses. Briefs were filed by Respondent and Counsel for the General Counsel.

Upon the entire record in this matter, my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following:

Findings of Fact

At all material times the Union has been the exclusive bargaining representative for an appropriate

[1] The complaint was amended at the hearing, without objection, to reflect that "official time" included the payment of travel and per diem expenses.

unit of Respondent's employees. Headquarters for Respondent's Western Region is apparently located in San Francisco, California, and the Region is composed of various satellite offices, including Area Offices and Post of Duty Offices.

By letter dated November 21, 1978, Respondent notified the Union's President, Joseph Sheean, of San Francisco, that it intended to relocate the Lodi, California Area Office to Sacramento, California, and establish a reduced Post of Duty Office in Lodi. It was anticipated that the action would require relocating nine employees from Lodi to Sacramento. Union president Sheean responded on December 1, 1978, advising Respondent that the Union wished to negotiate the decision to move or, alternatively, the impact the move would have on bargaining unit employees. The Union named Donald Pruett, a Steward in Respondent's Fresno Area Office who lived in Madera, California, to represent it in the matter.

By letter dated January 4, 1979, Pruett informed Respondent of the Union's desire to negotiate regarding "the condition and suitability of the facilities to be used by bargaining unit members . . ." as well as the options available to unit employees who did not volunteer for reassignment or who volunteered but chose not to move their residences.[2]

Respondent decided that since Pruett and Respondent's own Chief of Field Operations, Thomas Crone, had not yet seen the facilities under discussion, it would be to everyone's best interest to conduct the negotiations and view the various new facilities at the same time. Accordingly, Mardell Keehan, Personnel Specialist for Respondent, telephoned Union Rep-

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[2] Lodi is approximately thirty-four miles from Sacramento. *Rand McNally Road Atlas*, 51st Annual Edition, 1975, p. 16.

resentative Pruett and informed him that the parties would meet at 9:30 a.m. on February 23, 1979, at the site of the new Sacramento Area Office.[3] Nothing was said at the time relative to a specific format, time or location for negotiations on the issues raised by the rearrangement of the offices.

On February 21, 1979, Pruett called both Personnel Specialist Keehan and Chief of Field Operations Crone and asked them if the February 23 meeting could be incorporated with a "quarterly" meeting under the collective bargaining agreement or would he be permitted to take "bank time" for the period.[4] Pruett's request was denied and he was told that he would have to take either annual leave or leave without pay for the meeting.[5]

As suggested by Respondent, the parties met on February 23, 1979, around 9:30 a.m. at the new Sac-

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[3] Mardell Keehan was unavailable to testify at the hearing conducted on February 27, 1980. The parties agreed to present Ms. Keehan's testimony by deposition which was taken on March 7, 1980. Accordingly, the deposition of Mardell Keehan is hereby received as part of the record herein.

[4] Apparently the collective bargaining agreement between the Union and Respondent provided official time for union representatives at "quarterly" meetings. It is also apparent that using "bank time" would result in Pruett remaining in work status during the day.

[5] The telephonic replys [*sic*] were followed up with letters to the Union dated February 27 and March 21, 1979, which indicated that Respondent's employees could not receive official time for midterm negotiations, the latter stating that Respondent's National and Regional labor relations staff advised that employees did not ". . . receive time (i.e. official time, Bank Time, Administrative Leave, etc.) or reimbursement for any expenses in connection with Midterm negotiations." Accordingly, Pruett used eight hours annual leave on February 23, 1979.

ramento Area Office.[6] Pruett represented the Union and Respondent was represented by Keehan, Crone and two other management employees. The group examined the future work space which, at the time, was an open area although the floor was marked with tape for wall partitions and phone outlets. The cafeteria facilities were examined and the parties discussed related matters such as the manner in which walls would be constructed, the future location of work desks and access to rest rooms. Pruett indicated that the work area was acceptable but expressed dissatis-

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[6] The following account is a composite of the testimony of Pruett, Keehan and Crone. While Pruett's overall version of the incidents which occurred on February 23 corresponds in many respects with Keehan's and Crone's testimony, I am inclined to find Pruett's recollection to be somewhat less reliable. Pruett's testimony regarding the driving times from his home to and from the meeting places raises questions unanswered in the record but would seem to support Respondent's recollection of where the parties first met. Further, Respondent's corroborated testimony as to the order in which the facilities were visited and that a detailed discussion concerning the Union's proposals occurred only after visiting the new sites appears to be more reasonable. Thus, Pruett testified that the Union's proposals were discussed in detail at the first location visited and the final meeting of the day was a "brief proposing session," the details of which he could not recall. Keehan and Crone testified that a detailed discussion occurred after all the facilities had been visited. It would seem that an expression of final opinion by the Union on the "condition and suitability of the facilities" would most likely be a matter which would be reserved, at least from an overall perspective, until after the new facilities had been visited. Moreover, Pruett's testimony was often vague and conclusionary while Keehan's responses reflected a more detailed recollection of events. In any event, there is no real dispute as to what was discussed on February 23, only where and when the conversations took place.

faction with parking facilities and management replied that the parking arrangements at Sacramento were, nevertheless, better than a number of other offices.

After about an hour at the Sacramento location the group proceeded to Lodi where they had lunch. After lunch the parties met at the new Lodi Post of Duty Office. The premises were examined and the colloquy that occurred was much the same as that which transpired at Sacramento. The group remained at the Lodi office between thirty and forty-five minutes before adjourning to the old Lodi Area Office.

The session at the old Lodi Area Office encompassed a consideration of the various proposals which the Union made it its letter to Respondent dated January 4, 1979, *supra*. Pruett again expressed satisfaction with the new facilities except for the parking arrangements at Sacramento. However, Respondent maintained that no closer parking was available. During the meeting the parties also discussed excusing late arrival of employees at the new Sacramento Area Office while employees were adjusting their commuting schedules and the job assignments of two employees who were involuntarily transferred to Sacramento. At the conclusion of the meeting, which lasted approximately an hour and a half, Pruett returned to his home in Madera and Keehan and Crone drove back to their residences in the San Francisco area.[7]

By letter to Pruett dated March 8, 1979, Respondent summarized the decisions made at the February 23, meeting, as follows:

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[7] Pruett left Madera at 6:15 a.m. and returned at 5:45 p.m., on February 23, traveling a total of 308 miles for the trip.

"On February 23, 1979, the impact of the abolishment of the Lodi Area Office and the establishment of the Sacramento Area Office was discussed in the context of the three items listed in your letter dated January 4, 1979. Based on this discussion the following decisions were made:

"1. All parties agreed that the new Sacramento and Lodi facilities are acceptable. As was indicated during the meeting, the Sacramento parking facilities are the closest that could be obtained at this time. Management will continue to try to obtain closer parking as space becomes available.

"2. Article 16, Section 6 provides that a supervisor for adequate reasons, may excuse an employee without charge to leave who is unavoidably or necessarily absent for less than one hour or tardy; however, all employees will be expected to adjust their commute schedules to arrive at their new work locations on time.

"The Area Supervisor will hold a group meeting with all employees to discuss these matters and any related questions that employees might have.

"3. The Area Supervisor will hold individual discussions (or joint discussions if preferred by the employees) with John Thalken and Richard Bilger. The supervisor will indicate realistic, anticipated assignments for the two inspectors. Also, he will inform them that, as in the case for any ATF employee, they may apply for consideration for any announced vacancy."

Pruett acknowledged at the hearing that Respondent's March 8 summary, above, accurately reflects the agreements reached by the parties on February 23.

Issues

Counsel for the General Counsel contends that throughout February 23, 1979, the parties were engaged in collective bargaining negotiations and under the principles announced by the Federal Labor Relations Authority in *Interpretation and Guidance*, 2 FLRA No. 31, (December 19, 1979), Pruett was entitled to official time, travel and per diem expenses incurred in connection with the negotiations.

Respondent acknowledges that negotiations on impact of the office relocations occurred on February 23, 1979. However, Respondent contends that Pruett is not entitled to be granted official time for any part of February 23, nor entitled to any travel or per diem expenses. Respondent argues that:

1. The guidance and interpretation contained in 2 FLRA No. 31 is arbitrary and capricious, an abuse of discretion and constitutes the establishment of a policy which is beyond the statutory authority of the Authority.

2. The case herein was initiated prior to January 11, 1979, the effective date of the Statute, and the policy contained in 2 FLRA No. 31, enunciated in December 1979, should not apply retroactively to govern the instant case. Accordingly, Respondent contends that the situation herein should be governed by Executive Order 11491, as amended, under which official time would not have been required for the February 23, 1979, negotiations.

3. On the facts of the case ". . . little, if any, time spent during (February 23) would qualify as negotiations, and the General Counsel has failed to establish how much time should be granted, if any." Respondent urges that substantially all of the activities of February 23 pertained to gathering information

in preparation for negotiations and not the negotiations themselves. Further, according to Respondent, Pruett's claim is not valid in that no travel voucher was ever submitted claiming travel and per diem expenses for February 23.

4. The payment of per diem and travel expenses pursuant to 2 FLRA No. 31 is contrary to law in that money has not been specifically appropriated for this purpose.

Discussion and Conclusions

In its *Interpretation and Guidance*, 2 FLRA No. 31, the Authority concluded that the official time provisions of Section 7131(a) of the Statute encompass all negotiations of a collective bargaining agreement between an exclusive representative and an agency.[8] In reaching this conclusion the Authority relied on the literal language and legislative history of Section 7131(a) as supported by the express findings and purposes of the Statute reflected in Section 7101(a), which states that "labor organizations and collective bargaining in the civil service are in the public interest." The Authority further concluded that employees who are on official time under Section 7131 of the Statute while representing an exclusive representative in the negotiation of a collective bargaining agreement are "entitled to payments from agencies for their duty time and travel and per diem expenses."

As an Administrative Law Judge I am constrained to follow the Authority's pronouncements. Therefore, to address arguments which attack a statutory inter-

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[8] Section 7131(a) provides, in relevant part: "Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes . . . during the time the employee otherwise would be in a duty status. . ."

pretation made by the Authority or question the Authority's power or judgment in treating a matter would serve no useful purpose, especially where, as here, the Authority's position is clear and unmistakable. Accordingly, I reject Respondent's argument challenging the Authority's decision in 2 FLRA No. 31 as being arbitrary and capricious, an abuse of discretion and beyond its statutory authority. Similarly, I reject Respondent's contention that the payment of per diem and travel expenses, as required by the Authority in 2 FLRA No. 31, is contrary to law.

Further, I find no merit in Respondent's argument that the case herein was initiated prior to January 11, 1979, the effective date of the Statute, and therefore a finding of violation of the Statute herein would involve retroactive application of the Statute. True, the Union's request to negotiate was made in its letter of December 1, 1979 [*sic*], *supra*, and the Union submitted its proposals on January 4, 1979, *supra*. However the request and refusal to grant official time or expenses to the Union's representative did not occur until February 2[illegible], 1979, and thereafter. In my view it was the demand and refusal to grant Pruett official time to engage in negotiations that initiated the case herein. The Statute was in effect on the dates of the demand and refusal and the Authority, by its December 19, 1979, *Interpretation and Guidance* on official time, created no new rights but merely gave its view on the scope and meaning of Section 7131 of the Statute, as enacted. Thus, I conclude that the effect of the Authority's statement on this matter governs all situations involving official time for negotiations which occurred after January 11, 1979, the effective date of the Statute.

I also reject Respondent's contention that "little, if any, time spent during February 23, 1979 would qualify as negotiations . . ." Testimony from Respondent's own witnesses, documentary evidence of record, most notably Respondent's March 8, 1979 letter to the Union, *supra*, and admissions by Respondent in its brief belie a claim that no negotiations within the meaning of the Statute took place on February 23. Indeed, Respondent's witnesses testified that the last one and a half hour, or twenty-five percent of the day's meeting which began at 9:30 a.m. and concluded at 3:30 p.m. on February 23, 1979, was spent on impact negotiations.

Moreover, I conclude that the entire February 23 activities of the parties constituted negotiations within the meaning of Section 7131(a) of the Statute when considered in all the circumstances of the situation. Thus, Respondent's letter to the Union of February 21, *supra*, setting the date for the negotiations, although stating that negotiations would occur at the old Lodi Area Office, did not establish a time when the negotiations would commence. Nor can the letter be fairly interpreted to indicate that no discussions tantamount to negotiations would take place before the end of the tour of the new facilities. Respondent itself decided that it would be to everyone's best interest to conduct the negotiations and view the various new facilities at the same time. Respondent set the place where the day's activities were to begin without delimiting in any way what would be open for discussion at any time. While the activities of the parties at the new Sacramento Area Office and the new Lodi Post of Duty Office involved, in large measure, both parties gathering information about the physical condition and suitability of the two sites, there was some

discussion at these locations with regard to Pruett's acknowledgement [*sic*] that the building layouts were acceptable to the Union and his concern with the parking arrangement at Sacramento.

Also, it is noted that Respondent's letters to the Union of February 27 and March 21, 1979, *supra*, rejecting Pruett's claim for official time, while acknowledging that negotiations occurred, did not seek to segregate portions of February 23 as negotiating or non-negotiating time. Nor did Respondent's letter of March 8, summarizing the decisions reached on February 23, indicate that the parties only engaged in negotiations at the old Lodi Area Office at the end of that day.

Indeed, it is apparent that both parties before, during and immediately after February 23, considered the day's activities and discussions to constitute a continuous period of negotiation on the office relocations with the final session of the day culminating in a specific agreement on the Union's proposals. Accordingly, considering the total context of all the circumstances surrounding the February 23, 1979, meeting, I conclude that the entire day was spent in the process of negotiation within the meaning of the Statute.

With regard to Respondent's position that no travel voucher was submitted by Pruett and therefore no claim of violation of the Statute can be maintained, the uncontested record on this matter reveals two requests for official time and four separate replies by Respondent's agents that no official time would be granted to Pruett for the February 23 negotiations. It is reasonable to infer that since Pruett was clearly and repeatedly informed by management representatives that official time and expenses would not be forthcoming, a voucher requesting the same would not

be authorized for payment. It is axiomatic that the law does not require a futile gesture and on the state of the record herein, further consideration of Respondent's argument is unwarranted.

Accordingly, in view of the entire foregoing I find and conclude that by its failure and refusal to provide Union representative Donald Pruett with official time and whatever travel and per diem expenses he may have been entitled to were he considered to be on official Agency business while performing Union representational duties on February 23, 1979, Respondent failed and refused to comply with Section 7131 of the Statute and thereby violated Sections 7116(a)(1) and (8) of the Statute.[9]

Having found and concluded that Respondent violated Sections 7116(a)(1) and (8) of the Statute, I recommend that the Authority issue the following:

ORDER

Pursuant to Section 7118(a)(7) of the Federal Labor-Management Relations Statute and Section 2423.29 of the Final Rules and Regulations, it is hereby ordered that Bureau of Alcohol, Tobacco and Firearms, Western Region, Department of the Treasury, San Francisco, California, shall:

1. Cease and desist from:

(a) Failing and refusing to provide to Donald Pruett or any Agency employee, while engaged in

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[9] Sections 7116(a)(1) and (8) declare it to be an unfair labor practice for an agency: "(1) To interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter . . . (8) To otherwise fail or refuse to comply with any provision of this chapter."

representing the National Treasury Employees Union, Chapter 81, the employees' exclusive representative, during Union-Agency negotiations of a collective bargaining agreement, official time and whatever travel and per diem expenses an employee engaged in official Agency business would be entitled.

(b) In any like or related matter, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Provide Union representative Donald Pruett official time for the performance of his representational duties on February 23, 1979, and make him whole for the annual leave he utilized on that date, and upon submission of an appropriate voucher, pay to Donald Pruett whatever travel and per diem expenses an employee engaged in official Agency business would be entitled.

(b) Post at its various offices in the Western Region wherein unit employees are located, copies of the attached notice marked "Appendix." Copies of said notice, to be furnished by the Regional Director for Region 9, after being signed by an authorized representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 9, 450 Golden Gate Avenue, Room 11409, P.O. Box 36016, San Francisco, California 94102, in writing,

within 30 days from the date of this Order, what steps it has taken to comply herewith.

/s/ Salvatore J. Arrigo
SALVATORE J. ARRIGO
Administrative Law Judge

Dated: May 12, 1980
Washington, D.C.

APPENDIX E

2 FLRA No. 31

UNITED STATES
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

Case Nos. O-PS-3 and O-PS-6

INTERPRETATION AND GUIDANCE

As previously announced,[1] the Authority determined, in conformity with its rules and regulations and the Federal Service Labor-Management Relations Statute (92 Stat. 1191), that an interpretation of the Statute was warranted on the following:

1) Whether employees who are on official time under section 7131 of the Statute while representing an exclusive representative in the negotiation of a collective bargaining agreement are entitled to payments from agencies for their travel and per diem expenses.

2) Whether the official time provisions of section 7131(a) of the Statute encompass all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

Concurrently, the Authority invited interested persons to express their views in writing with respect to the above matters, including the impact, if any, of section 7135(a)(1) of the Statute (92 Stat. 1215) on these matters. The responses submitted to the Au-

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[1] Federal Labor Relations Authority, *Notice Relating to Official Time*, 44 Fed. Reg. 42,788 (July 20, 1979).

thority were most thorough and helpful and have been carefully considered. In view of the depth and scope of these submissions, the Authority has determined that no useful purpose would be served by providing for an oral presentation of views.

Section 7131 of the Statute

As indicated above, both matters at issue pertain to section 7131 of the Statute (92 Stat. 1214), which reads as follows:

> § 7131. *Official time*
>
> (a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this [Statute] shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.
>
> (b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a nonduty status.
>
> (c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official

time for such purpose during the time the employee otherwise would be in a duty status.

(d) Except as provided in the preceding subsections of this section—

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this [Statute], any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

We turn to the application of the above-quoted provisions, and particularly section 7131(a), to the matters here in question. For convenience of discussion, we shall consider the questions in reverse order.

Nature of Negotiations to Which Official Time Applies

The second of the two matters at issue is the following:

> Whether the official time provisions of section 7131(a) of the Statute encompass all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

Section 7131(a) expressly states in relevant part that "[a]ny employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this [Statute] shall be authorized official

time for such purposes, including attendance at impasse proceeding[s]." This section thus provides that when an exclusive representative and an agency undertake the negotiation of a "collective bargaining agreement," an employee representing the exclusive representative in that undertaking must be authorized official time for such purposes.

In this connection, the phrase "collective bargaining agreement" in section 7131(a) is defined at section 7103(a)(8) (92 Stat. 1193), as follows:

> (8) "collective bargaining agreement" means an agreement entered into as a result of collective bargaining pursuant to the provisions of this [Statute].

The phrase, "collective bargaining," in turn, is defined in section 7103(a)(12) (92 Stat. 1194) as follows:

> (12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession[.]

It is apparent from the specific language in these definitions that a "collective bargaining agreement" is any agreement that is entered into as a result of the

performance of the mutual obligation of the parties to bargain in a good-faith effort to reach agreement with respect to conditions of employment affecting employees in the appropriate unit. Consequently, the language reflects the intent of Congress that the entitlement of official time under section 7131(a) would encompass all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

Such conclusion as to the intent of Congress is supported by the legislative history of section 7131(a) of the Statute. More particularly, section 7131(a) is identical to section 7132(a) of the Bill (H.R. 11280) reported to the House by the House Post Office and Civil Service Committee.[2] In adopting the provisions in section 7132(a) of the House Bill, Congress rejected the relevant language in section 7232 of the Bill (S. 2640) reported to the Senate by the Senate Governmental Affairs Committee.[3] That section of the

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[2] *See* H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 288 (1978).

[3] Section 7232 of the Senate Bill provided:

> Solicitation of membership or dues and other internal business of a labor organization shall be conducted during the nonduty hours of the employees concerned. Employees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management, except that the negotiating parties may agree to arrangements which provide that the agency will authorize a reasonable number of such employees (not normally in excess of the number of management representatives) to negotiate on official time for up to 40 hours, or up to one-half the time spent in negotiations during regular working hours.

Senate Bill had sought, in effect, to maintain the restrictions imposed upon the use of official time for negotiations by employees representing unions as established in E.O. 11491, as amended.

Significantly, as to section 7232 of the Senate Bill, the Senate Committee Report had stated that it applied "to the negotiation or renewal of a *basic* collective bargaining agreement, *as opposed* to negotiations which arise out of circumstances during the term of the basic agreement" (emphasis added).[4] The House Bill which was adopted by Congress contains wholly different provisions on the relevant subject of official time, and there is no indication whatsoever that Congress intended to limit the use of official time to the negotiation of basic agreements as contemplated by the rejected language of the Senate Bill.

Thus, the legislative history demonstrates that Congress intended, consistent with the specific language of section 7131(a) and the related definitions in section 7103(a)(8) and (12), that the entitlement of official time under section 7131(a) would apply whenever the parties undertake the negotiation of a collective bargaining agreement.

Apart from the literal language and legislative history of section 7131(a) of the Statute, the conclusion that Congress intended that official time apply to the negotiation of any collective bargaining agreement is supported by the express findings and purpose of the Statute as stated in section 7101(a), namely, that "labor organizations and collective bargaining in the civil service are in the public interest." Certainly, it would implement the ends of collective bargaining to

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[4] S. Rep. No. 95-969, 95th Cong., 2d Sess. 112 (1978).

sanction official time for all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement. For only in such manner may effective union representation comparable to the representation of management be achieved under the Statute, and only in this manner may both parties effectively fulfill their respective obligations under section 7114(b) of the Statute (92 Stat. 1202) "to meet at reasonable times . . . as frequently as may be necessary" for good-faith negotiations on conditions of employment of the unit employees.

Accordingly, for the reasons stated above, it is concluded that the official time provisions of section 7131(a) of the Statute encompass all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

Entitlement of Employees on Official Time to Travel and Per Diem Expenses

As mentioned at the outset, the other matter here at issue is the following:

> Whether employees who are on official time under section 7131 of the Statute while representing an exclusive representative in the negotiation of a collective bargaining agreement are entitled to payments from agencies for their travel and per diem expenses.

On this issue it is clear from the Statute that employees who are on official time under section 7131 while representing an exclusive representative in the

negotiation of a collective bargaining agreement are entitled to payments from agencies for their travel and per diem expenses.

As previously set forth, section 7131(a), which is principally here involved, provides that an employee representing an exclusive representative in the negotiation of a collective bargaining agreement shall be on official time "during the time the employee otherwise would be in a duty status." As explained in the House Report, an employee serving as a union representative is authorized "paid time" while engaging in the negotiation activities provided for in section 7131 (a) of the Statute.[5] Hence, while an employee is on official time representing an exclusive representative in the negotiation of a collective bargaining agreement, that employee is on paid time entitled to his or her usual compensation and is not in leave status.

Neither the Statute, nor its legislative history, expressly adverts to the payment of travel expenses or per diem during participation in these negotiation activities.[6] However, it is well established that such

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[5] H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 58 (1978).

[6] Under section 20 of E.O. 11491, as amended, travel expenditures were not authorized for union representatives engaged in negotiation activities (*Labor-Management Relations in the Federal Service* (1975) at 58). However, as previously indicated, Congress substantially rejected section 7232 of the Senate Bill which sought in effect to maintain the language of the Order. Moreover, unlike under section 20 of the Order which strictly limited the amount of official time which might be authorized for negotiation activities by union representatives, section 7131(a) of the Statute contains no such limitation. Further, unlike under the Order, the encouragement of collective bargaining is a stated purpose of the Statute.

expenses are authorized when an employee "is engaged on official business for the Government" (Chapter 57, Subchapter I—*Travel and Subsistence Expenses; Mileage Allowances*, 5 U.S.C. § 5701, *et seq.*). As already mentioned, Congress, in adopting the Statute, specifically found in section 7101(a) that collective bargaining "contributes to the effective conduct of public business," and that "collective bargaining in the civil service [is] in the public interest." Further, Congress expressly mandated in sections 7114 and 7116(a)(5) and (b)(5) that such negotiations be conducted in good faith by the parties involved (92 Stat. 1202, 1204). Thus, an employee, while negotiating a collective bargaining agreement as a union representative and while on paid time entitled to his or her usual compensation and not in a leave status, is clearly engaged on "official business for the Government."

Additionally, it is not controverted that management representatives are uniformly paid travel expenses and per diem when engaged in the negotiation of a collective bargaining agreement on behalf of management, and Congress indicated its intent that similar prerogatives be accorded employees serving as union representatives likewise engaged in the negotiation of a collective bargaining agreement. In this connection, Representative Clay, in discussing the proscription of official time for employees engaged in internal union business under section 7132(b) of the House Bill (which was enacted as section 7131(b) of the Statute) stated as follows:[1]

> Section 7132(b) of the Udall compromise bars the use of official time for conducting the internal

[1] 124 Cong. Rec. H9,638 (daily ed. Sept. 18, 1978).

> business of a labor organization. . . . Activities that involve labor-management contacts are not included in this section. . . . Title VII imposes heavy responsibilities on labor organizations and on agency management. These organizations should be allowed official time to carry out their statutory representational activities *just as* management uses official time to carry out its responsibilities. [Emphasis added.]

The payment of travel and per diem expenses would not only more nearly equate the status of union and management negotiators as contemplated by Congress, but would also facilitate more effective union representation at the bargaining table, thereby implementing the purpose of the Statute, as reflected in section 7101(a), to encourage collective bargaining in the Federal sector.

Finally, it should be noted that section 7131(c) of the Statute, identical as here relevant to section 7131(a), provides that:

> (c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority *shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.* [Emphasis added.]

The Authority has previously interpreted this language of the Statute in section 2429.13 of its Interim Rules and Regulations, as entitling the employee on such official time to transportation and per diem expenses (44 Fed. Reg. 44771 (July 30, 1979)). No persuasive reason has been advanced for a contrary

interpretation of the analogous language in section 7131(a) of the Statute, and no supported challenge has been advanced regarding the legality of the Authority's prior interpretation of the same critical language in section 7131(c).

In summary, any employee who is on official time under section 7131 of the Statute while representing an exclusive representative in the negotiation of a collective bargaining agreement is entitled to payments from agencies for their duty time and travel and per diem expenses.

Impact of Savings Provisions in the Statute

Lastly, the question as to the impact, if any, of the savings provisions in section 7135(a)(1) of the Statute on the above matters must be considered.[8] More specifically, the question is whether provisions in existing agreements which are more restrictive than section 7131(a) on the granting of official time, as well as the payment of travel and per diem expenses, for employees representing a union in the negotiation of a collective bargaining agreement, remain operative under section 7135(a)(1) of the Statute.

Section 7135(a) reads in relevant part as follows:

> (a) Nothing contained in this [Statute] shall preclude—
>
> (1) the renewal or continuation of . . . a lawful agreement between an agency and an exclusive

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[8] The savings clause in section 7135(b) of the Statute (92 Stat. 1215) is clearly without impact, since the provisions of section 7131(a), which are here involved, are completely different from the related provisions in section 20 of E.O. 11491, as amended, and section 7131(a) thereby "supersedes" the "policies, regulations, and procedures established under" the Executive Order.

representative of its employees, which is entered into before the effective date of this [Statute][.]

By this express language of section 7135(a)(1), nothing in the Statute precludes the parties to a lawful agreement in existence on January 11, 1979, the effective date of the Statute, from mutually renewing or continuing the terms of that agreement if they so desire. Thus, for example, if the provisions of an existing agreement limit the authorization of official time to employee representatives of a union in the negotiation of a basic collective bargaining agreement, nothing in the Statute precludes the parties to such an existing agreement, if they wish, from mutually renewing or continuing the terms of that agreement.

However, where a labor organization or an agency objects to the continuation or renewal of a provision relating to official time more restrictive than section 7131(a), such objection prevents the continuation or renewal of the agreement provision under section 7135(a)(1) of the Statute. In that situation, the provisions of section 7131(a) would be immediately operative. That is, any employee representing an exclusive representative in the negotiation of a collective bargaining agreement would be entitled to official time, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement, and any employee on such official time under section 7131(a) of the Statute would be entitled to payments from the agency for their travel and per diem expenses.

Conclusion

It is the Authority's interpretation and guidance that:

1. The official time provisions of section 7131(a) of the Statute encompass negotiations between an exclu-

sive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

2. Employees who are on official time under section 7131 of the Statute while representing an exclusive representative in the negotiation of a collective bargaining agreement are entitled to payments from agencies for their duty time and travel and per diem expenses.

3. Provisions in agreements existing on January 11, 1979, the effective date of the Statute, which are more restrictive than section 7131(a) of the Statute on the granting of official time, as well as the payment of travel and per diem expenses, for employees representing a union in the negotiation of a collective bargaining agreement may be renewed or continued if the parties so desire, under section 7135(a)(1) of the Statute. However, if either party to such provisions in an existing agreement objects to the continuation or renewal thereof, such objection prevents the continuation or renewal of those agreement provisions under section 7135(a)(1) of the Statute.

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/s/ Ronald W. Haughton
RONALD W. HAUGHTON, Chairman

/s/ Henry B. Frazier III
HENRY B. FRAZIER III, Member

/s/ Leon B. Applewhaite
LEON B. APPLEWHAITE, Member

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